



Citation: Abasov v. Peel Mutual Insurance Company, 2024 ONLAT 22-011748/AABS

Licence Appeal Tribunal File Number: 22-011748/AABS

In the matter of an application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8, in relation to statutory accident benefits.

Between:

Lilia Abasov

Applicant

and

Peel Mutual Insurance Company

Respondent

DECISION

VICE-CHAIR: Tyler Moore

APPEARANCES:

For the Applicant: Carla Barcelo, Paralegal

For the Respondent: Sonya Katrycz, Counsel

HEARD: By Way Of Written Submissions

OVERVIEW

- [1] Carla Barcelo, the applicant, was involved in an automobile accident on May 12, 2022, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “*Schedule*”). The applicant was denied benefits by the respondent, Insurer, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “*Tribunal*”) for resolution of the dispute.

ISSUES

- [2] The issues in dispute are:
- i. Is the applicant entitled to non-earner benefits (“NEBs”) in the amount of \$185.00 per week from May 12, 2022 to present?
 - ii. Is the applicant entitled to \$3,749.20 for chiropractic services, proposed by Safe Space Rehabilitation Centre in a treatment plan/OCF-18 (“plan”) dated July 21, 2022?
 - iii. Is the applicant entitled to \$3,341.12 for chiropractic services, proposed by Safe Space Rehabilitation Centre in a treatment plan dated August 22, 2022?
 - iv. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [3] The applicant is not entitled to NEBs.
- [4] The applicant is not entitled to the proposed treatment plans for chiropractic services.
- [5] As no benefits are payable, the applicant is not entitled to interest.

ANALYSIS

NEBs

- [6] I find that the applicant has not met her onus to establish entitlement to NEBs.
- [7] Section 12(1) provides that an insurer shall pay an NEB to an insured person who sustains an impairment as a result of the accident, if the insured person suffers a complete inability to carry on a normal life as a result of and within 104

weeks after the accident. Section 3(7)(a) defines a “complete inability to carry on a normal life” as “an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.”

- [8] It is well established that the test for NEBs is set out in the decision of *Heath v. Economical Mutual Insurance Company* 2009 ONCA 391 (“*Heath*”), wherein the Court of Appeal held that the analysis focuses on a comparison of the applicant’s pre- and post-accident activities over a reasonable period of time.
- [9] The applicant submits that she is entitled to NEBs because her accident-related injuries and the exacerbation of her pre-existing physical pain impede her daily activities, and routine tasks have become challenging because of mobility restrictions, leading to an increased dependence on family members. She reports constant pain, difficulty walking, sitting, or lying down, significant disturbances in sleep, and decreased social interactions that have decreased her overall enjoyment of life as a result of the accident.
- [10] The applicant relies on the initial post-accident clinical intake report and OCF-3 of Dr. Mir-Reza Nabavi, chiropractor at Safe Space Rehabilitation Centre dated June 7 and June 17, 2022. In his initial intake, Dr. Nabavi indicated that the applicant’s activities of daily living have been affected by the accident including cooking, cleaning, doing laundry, and getting groceries. He also reported that the applicant was not able to bend, lift, sit, or stand for too long.
- [11] The respondent concurs that the applicant has a history of pre-accident musculoskeletal pain. Imaging from 2019 showed mild osteoarthritis of the knees, moderate osteoarthritis of the left hip, and moderate to marked degenerative disc disease at L4-S1. An MRI dated April 2021 revealed significant narrowing of the cervical spine of the C4-C7 disc spaces. The respondent argues that the applicant’s pain complaints increased leading up to the accident, during which time she was prescribed Naproxen and physiotherapy, and she was referred to a rheumatologist and pain clinic. In February 2022, the applicant complained to her family doctor, Dr. Lew Pliamm, about bilateral arm pain and numbness that was so severe she could not wait a few weeks for an appointment. X-rays confirmed arthritis in both shoulders, both wrists, and throughout the applicant’s fingers. Just a month before the accident, on April 6, 2022 the applicant complained to Dr. Pliamm of worsening pain in her wrists and various other joints and requested pain injections and a referral to a pain clinic.
- [12] The respondent submits that the applicant did not notify Dr. Pliamm of her accident until June 20, 2022, when she was diagnosed with ‘likely whiplash

injury' with 'strain'. When she consulted with a pain specialist just five days after the accident related to a pre-accident referral, Dr. Pezhman Mehrabian did not indicate that she even mentioned the accident. Instead, the applicant reported that her back pain and musculoskeletal complaints had been an issue for many years.

- [13] The respondent submits that the only evidence the applicant has provided in support of her claim for NEBs is the OCF-3 dated June 17, 2022. The OCF-3 did not, however, provide any evidence or explanation to support a finding that the applicant suffered a complete inability to carry on her normal life as a result of the accident. It is also inconsistent with Dr. Pliamm's clinical note dated June 20, 2022 which indicates that the applicant's only accident-related injuries were 'likely whiplash' and 'strain', and no functional impairments were identified.
- [14] From a functional perspective, the respondent relies on the occupational therapy report of Mr. Stewart Tsuji dated April 18, 2023 that confirms the applicant's daily routine remained largely unchanged after the accident. The respondent also relies on the April 18, 2023 psychological and psychiatry reports from Dr. Mahvash Elmpak and Dr. Alfonse Marchie. Dr. Elmpak diagnoses the applicant with somatic symptom disorder but concludes that she does not suffer a complete inability to carry on a normal life as a result of the accident. Dr. Marchie, like Dr. Pliamm, concludes that the applicant suffers soft-tissue injuries as a result of the accident and finds that many of the applicant's health issues were not accident-related. Dr. Marchie also concludes that the applicant was capable of carrying on her normal life and does not meet the test for NEBs.
- [15] I am persuaded by the consistent pre- and post-accident activity comparison reports by Mr. Tsuji, Dr. Marchie, and Dr. Elmpak. While the applicant submits that her accident-related pain has significantly impacted her daily life, I find that these reports demonstrate that before the accident the applicant was already sharing meal preparation and housekeeping with her husband, she would ask her children for help with 'heavy' housekeeping tasks, she did not do the laundry or vacuum, she played piano and taught her grandchildren how to play, she watched television and read, she would go for a walk around her building, and she did not drive. I also find that the reports confirm that these activities remained largely unchanged after the accident. The applicant continues to report that she shares meal preparation with her husband, she will do some dusting and her husband vacuums, her husband does the laundry, her grandchildren do not want to take piano lessons any longer but she still plays piano occasionally, she likes to watch television and read, and she continues to attend family events. Mr. Tsuji's also notes that the applicant's social circle has shrunk over the last few

years mainly because of COVID restrictions and not necessarily because of the applicant's accident-related impairments.

- [16] I have also considered Mr. Tsuji's pre- and post-accident comparison of the applicant's daily routine, which I find reflects that her daily routine remains largely unchanged. The only reported changes are that the applicant holds on to her husband when they go out for a walk because her left leg can feel unsteady, and she sometimes has difficulty falling asleep and sometimes wakes up during the night. Mr. Tsuji's notes do not indicate, however, that the applicant feels tired during the day.
- [17] While I recognize that the applicant was seeking medical care for several musculoskeletal conditions before the accident, I find that the evidence does not support a complete inability to carry on a normal life as a direct result of the accident itself. I accept that the applicant may have some reduced function following the accident, but find that her self-reporting and the findings of multiple assessors do not support that her impairments continuously prevent her from engaging substantially all activities that she ordinarily engaged before the accident. For these reasons, I find that the applicant has not met her onus of establishing, on a balance of probabilities, that she is entitled to NEBs.

Treatment plans for chiropractic services

- [18] I find that the applicant is not entitled to \$3,749.20 for chiropractic services dated July 20, 2022 or \$3,341.12 for chiropractic services dated August 22, 2022. The treatment plan dated July 20, 2022 was not properly submitted or denied, and the applicant has not established on a balance of probabilities that the treatment plan dated August 22, 2022 is reasonable and necessary.
- [19] To receive payment for a treatment and assessment plan under s. 15 and 16 of the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. To do so, the applicant should identify the goals of treatment, how the goals would be met to a reasonable degree and that the overall costs of achieving them are reasonable.
- [20] The respondent submits that the treatment plan dated July 20, 2022 proposing chiropractic services was never submitted. This is supported by an HCAI screen shot which reflects every treatment plan submitted to the respondent for consideration. This treatment plan does not appear in HCAI. The respondent argues that because there was no proper submission or denial, the Tribunal lacks jurisdiction to deal with this issue. Although the applicant was asked to

withdraw the issue at the Case Conference, she refused to, despite the fact that she did not submit the treatment plan in her submissions or address any of the treatment plans in dispute individually.

- [21] I find that the applicant did not provide any evidence that would contradict the respondent's position. Without confirmation of the proper submission and denial of the treatment plan, I find that the Tribunal does not have the jurisdiction to adjudicate whether the plan is reasonable and necessary pursuant to the *Schedule*. For that reason, I have not addressed this treatment plan further.
- [22] With respect to the treatment plan dated August 22, 2022, Dr. Nabavi proposes 16 sessions of chiropractic manipulation, health promotion, exercise, acupuncture, and muscle/nerve stimulation. The goals of the treatment are listed as pain reduction, increased strength, increased ranges of motion, and to maximize function. Dr. Nabavi noted that the applicant experienced mild improvement in coping with pain at the time of her re-assessment, and he also recommended consultation with a chronic pain specialist and psychologist.
- [23] The applicant acknowledges in her submissions that despite engaging in various treatments, including chiropractic, there has been no substantial improvement in her condition. The treatments have only provided temporary relief. According to Dr. Marchie's April 2023 physiatry assessment, the applicant's report of persistently high levels of pain indicates an unmet need for more effective treatment strategies. Dr. Marchie recommends a shift towards self-directed exercise, but the applicant submits that this might not be feasible considering her current level of pain and functional limitations. I find, however, that this contradicts the applicant's report that she exercises daily for 20-30 on a stationary bike at home and does stretching exercises in bed before getting up each morning.
- [24] The respondent argues that the long list of injuries identified on the treatment plan includes sprain/strain of the hip, knee, back, ankle, and wrist, but all of those were documented issues the applicant had before the accident. The respondent submits that there is no evidence that these issues were exacerbated by the accident apart from the applicant's self-report. Dr. Nabavi's OCF-3 dated June 2022 indicates that all the listed injuries were caused by the accident, but the respondent argues that is entirely untrue and undermines Dr. Nabavi's recommendations and credibility. Neither the applicant nor Dr. Nabavi address the fact that physiotherapy was recommended to the applicant just one month before the accident by Dr. Pliamm for the same issues listed on the treatment plan.

[25] I agree that Dr. Nabavi's list of injuries caused by the accident does not account for the applicant's pre-accident condition history or pre-accident treatment. For that reason, I have given limited weight to his findings and recommendations. I also find that a treatment plan by itself does not establish that proposed treatment is reasonable and necessary. There must be supportive objective medical evidence to substantiate it. The applicant acknowledges that there has been no substantial improvement with treatment, including chiropractic care. She has also not provided objective medical evidence to substantiate that the proposed treatment is warranted to treat injuries that resulted from the accident. Dr. Marchie's findings corroborate that there are no diagnostic studies to indicate any accident-related pathologies that would explain the applicant's musculoskeletal pain symptoms.

[26] The applicant also submits that chiropractic care has been recommended by several healthcare providers, and that pain is subjective and to measure pain and progress with pain it is imperative that she undergo facility-based treatment where it can be assessed and treated accordingly. I disagree with this submission because I am not persuaded that subjective pain requires facility-based treatment to be properly assessed and treated. The applicant has also not specified who specifically has recommended chiropractic care apart from her treating chiropractors. I find that the applicant's argument does not provide evidence that supports the proposed treatment plan is reasonable and necessary.

[27] For these reasons, and the limited weight I have given to Dr. Nabavi's findings and recommendation, I find that the applicant has failed to discharge her onus of establishing that the proposed treatment plan is reasonable and necessary on a balance of probabilities.

Interest

[28] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule*. As no benefits are payable, no interest applies.


ORDER

[29] The applicant is not entitled to NEBs.

[30] The applicant is not entitled to the proposed treatment plans for chiropractic services.

[31] As no benefits are payable, the applicant is not entitled to interest.

Released: November 1, 2024



Tyler Moore
Vice-Chair